[Cite as *Allstate Ins. Co. v. Jaeger*, 2009-Ohio-5756.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

ALLSTATE INSURANCE COMPANY	C. A. No. 09CA009591
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 2004 CV 138244
JEANNE J. JAEGER, et al.	
Appellees	

DECISION AND JOURNAL ENTRY

Dated: November 2, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} M.J. was 15 years old when he got drunk, stole a car, and wrecked it on private, residential property, damaging a garage and a fence. After paying the damage claims of its insureds, Allstate sued M.J.'s mother, Jeanne Jaeger, alleging vicarious parental liability under Section 3109.09(B) of the Ohio Revised Code and common-law negligent supervision. The trial court granted Ms. Jaeger's motion for summary judgment on all claims. Allstate has appealed, arguing that the trial court incorrectly granted summary judgment because there are genuine issues of material fact regarding whether M.J.'s actions could subject his mother to vicarious parental liability under Section 3109.09 of the Ohio Revised Code. Allstate has also argued that the trial court incorrectly granted the motion on the negligent supervision claim because she failed to meet her initial burden under Rule 56(C) of the Ohio Rules of Civil Procedure. This

Court affirms because there are no genuine issues of material fact remaining for trial and Ms. Jaeger met her summary judgment burden under Rule 56(C).

BACKGROUND

{¶2} The parties agree that on September 19, 2003, Ms. Jaeger's son, M.J., went to his cousin's house in Avon Lake, Ohio. Despite being just 15 years old at the time, M.J. became intoxicated and drove away from the house in a car belonging to Lawrence Holland. Nobody gave M.J. permission to drive the car. He did not have a driver's license and, according to his mother, had never driven a car before that night. M.J. lost control of the car and crashed it, damaging a garage belonging to James Chiara and a fence belonging to Mark Brandt. Allstate insured both the Chiara and Brandt properties at the time.

STATUTORY CLAIM: R.C. 3109.09

{¶3} Allstate's first assignment of error is that the trial court incorrectly granted summary judgment in favor of Ms. Jaeger on its statutory claims under Section 3109.09 of the Ohio Revised Code. The trial court determined that Ms. Jaeger was not liable under the statute because the acts that caused the property damage were not willful or intentional and Allstate was not the owner of the car her son had allegedly stolen. In reviewing a trial court's ruling on a motion for summary judgment, this Court applies the same standard a trial court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

{¶4} Under Section 3109.09(B) of the Ohio Revised Code, "[a]ny owner of property . . . may maintain a civil action to recover compensatory damages not exceeding ten thousand dollars and court costs from the parent of a minor if the minor willfully damages property

belonging to the owner or commits acts cognizable as a 'theft offense,' as defined in section 2913.01 of the Revised Code, involving the property of the owner." Section 3109.09 is aimed at decreasing "juvenile delinquency, vandalism and malicious mischief" by penalizing the parents of destructive children. *Conover v. McCutcheon*, 9th Dist. No. 1832, 1990 WL 40163 at *1 (Apr. 4, 1990).

{¶5} There are two independent grounds for liability under Section 3109.09: (1) a willful act of property damage, or (2) an act "cognizable as a 'theft offense' . . . involving the property of the owner." R.C. 3109.09(B). In order for a parent to be found liable under this Section for her child's willful act of property damage, "both the initial act, as well as the subsequent injury, must be found to be intentional." *Peterson v. Slone*, 56 Ohio St. 2d 255, 257 (1978) (holding no parental liability because child's specific act of wrecking stolen car was not intentional, despite his initial intentional acts of stealing the car, driving it without a license, and making a left hand turn).

WILLFUL DAMAGE PROVISION OF R.C. 3109.09

{¶6} In construing the phrase "willfully damages" found in Section 3109.09(B), the Ohio Supreme Court distinguished between "wanton negligence" and a "willful tort" that "involves the element of intent or purpose." *Motorists Mut. Ins. Co. v. Bill*, 56 Ohio St. 2d 258, 265 (1978) (quoting *Payne v. Vance*, 103 Ohio St. 59, paragraph one of the syllabus (1921)). Thus, a parent may not be held liable under the willful acts provision of Section 3109.09 for damage caused by joyriding in a stolen car unless the child also intentionally caused the subsequent damage to it. *Id.* at 266 (holding no parental liability for minor who intentionally drove stolen car "in a wanton and reckless manner . . . without due regard for the property of others" because he "did not intend to, or willfully, damage" the car).

{¶7} Ms. Jaeger moved for summary judgment, arguing that there was no genuine issue of material fact regarding whether her son had willfully caused damage to the Chiara and Brandt properties. Ms. Jaeger admitted that her son took Mr. Holland's car without permission and drove it without a license. She also submitted the affidavit of Kathleen Blesi who saw M.J. just before he took the car. Ms. Blesi said that M.J. was intoxicated at the time and that she believed he crashed the car "because [he] was intoxicated and had no experience driving a car." Ms. Jaeger pointed out that Allstate had failed to present any evidence tending to show that her son intentionally damaged the garage and fence.

{¶8} In fact, Allstate failed to even allege that M.J. had intentionally or willfully damaged the Chiara and Brandt properties. In the "Operative Facts" section of its amended complaint, Allstate alleged that "[w]hile driving [the] automobile through the residential streets of Avon Lake, [Ms. Jaeger's] minor child lost control of said vehicle and crashed the vehicle into and through Chiara's . . . garage." Allstate continued to allege that "[t]he extensive damages to the Chiara and Brandt properties arose as a result of [Ms. Jaeger's] minor child negligently operating a motor vehicle without the owner's permission and without a valid Ohio Drivers' License."

{¶9} Allstate's brief in opposition to Ms. Jaeger's motion for summary judgment did not reference any affidavits, depositions, or other evidence of a type described in Rule 56(C) of the Ohio Rules of Civil Procedure. In it, Allstate argued that the damage to the two properties was "a natural consequence [of M.J.'s] willful actions" of taking the car without permission and intentionally driving it without a license. Allstate again admitted in its brief that M.J. "lost control of the vehicle" and crashed into the Chiara and Brandt properties.

{¶10} Allstate has misunderstood the law of Ohio. Even though the parties agree that M.J. took a car without permission and drove it without a license, unless he willfully drove it into the garage and the fence, his mother cannot be held liable under the willful acts provision of Section 3109.09(B). See *Motorists Mut. Ins. Co. v. Bill*, 56 Ohio St. 2d 258, 266 (1978). The parties agree that M.J. lost control of the car, thereby negligently causing damage to the Chiara and Brandt properties. Even viewing the evidence in the light most favorable to Allstate, there is no genuine issue of material fact regarding whether M.J. willfully drove the car into the garage and the fence. Therefore, the trial court correctly granted Ms. Jaeger's motion for summary judgment on the statutory claim based on the willful acts provision of Section 3109.09(B) of the Ohio Revised Code. Allstate's first assignment of error is overruled to the extent it addressed the willful acts provision of the statute.

THEFT PROVISION OF R.C. 3109.09

{¶11} "Parental liability arises under the 'theft provision' of R.C. 3109.09 when the child has engaged in conduct which is the equivalent of theft and the property thereafter is damaged, regardless of whether the child acted in a willful manner at the time the property was damaged." *Conover v. McCutcheon*, 9th Dist. No. 1832, 1990 WL 40163 at *2 (Apr. 4, 1990) (citing *Schirmer v. Losacker*, 70 Ohio St. 2d 138, 139 (1980)). The unauthorized use of a motor vehicle, prohibited by Section 2913.03, is listed under the definition of "[t]heft offense" in Section 2913.01(K)(1). Thus, a child who takes a car without permission has committed an act "cognizable as a 'theft offense'" under Section 2913.01 and may subject his parents to liability under the statute. R.C. 3109.09(B).

{¶12} In this case, Ms. Jaeger moved for summary judgment, arguing that Allstate could not collect under Section 3109.09 because it is not subrogated to the owner of the property

involved in the theft offense. Ms. Jaeger pointed out that Mr. Holland, rather than Allstate's insureds, owned the car that was involved in M.J.'s theft offense. Because Section 3109.09(B) only provides a right of recovery to an owner whose property is involved in the theft offense, Ms. Jaeger argued that the statute does not provide Allstate a right to recover against her for the damage to the Chiara and Brandt properties.

{¶13} "Under the common law, parents were not held liable in damages for the torts of their minor children solely because of the parent-child relationship." *Motorists Mut. Ins. Co. v. Bill*, 56 Ohio St. 2d 258, 261 (1978). Section 3109.09 was enacted in derogation of the common law and must be strictly construed. *Id.* at 263. Under Section 3109.09, a parent may be found liable for damage caused by his child who, having stolen a car, negligently operates it, causing damage to it. *Conover v. McCutcheon*, 9th Dist. No. 1832, 1990 WL 40163 at *2 (Apr. 4, 1990) (parent liable to owner whose car was damaged by negligent driving of son who took the car without permission). Under the theft offense provision, the statute provides a remedy, but only for the owner of property involved in the theft offense, not a real property owner whose land is damaged in the process. R.C. 3109.09(B) ("Any owner of property . . . may maintain a civil action . . . [against] the parent of a minor if the minor . . . commits acts cognizable as a 'theft offense' . . . involving the property of the owner.").

{¶14} A subrogated insurer may maintain a civil action under Section 3109.09(B) against parents in custody and control of a minor who engages in the behavior described in the statute. *Motorists Mut. Ins. Co. v. Bill*, 56 Ohio St. 2d 258, paragraph two of syllabus (1978). But, the subrogated insurer merely "'stand[s] in the shoes' of the compensated owner." *Id.* at 267. Therefore, if the owner is not capable of maintaining an action under the statute, then neither is the subrogated insurer.

{¶15} Section 3109.09 does not provide a remedy for a real property owner whose land is unintentionally damaged by a minor joyriding in a stolen car. Ms. Jaeger admitted that her son engaged in unauthorized use of Mr. Holland's vehicle and, thus, in an act cognizable as a "theft offense." R.C. 3109.09(B). The parties do not dispute that the property involved in the theft offense did not belong to Allstate's insureds. Thus, the trial court correctly granted summary judgment in favor of Ms. Jaeger on Allstate's statutory claims against her. Allstate's first assignment of error is overruled.

NEGLIGENT SUPERVISION

{¶16} Allstate's second assignment of error is that the trial court incorrectly granted Ms. Jaeger summary judgment on its common-law claim because she failed to carry her initial burden under Rule 56(C). Rule 56(C) of the Ohio Rules of Civil Procedure provides that "[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." If the moving party meets its initial burden by identifying specific parts of the record that demonstrate that there are no issues of material fact regarding the essential elements of a claim, the nonmoving party bears a reciprocal burden of setting forth specific facts demonstrating that an issue of fact exists for trial. *Vahila v. Hall*, 77 Ohio St. 3d 421, 428-29 (1997); Civ. R. 56(E). The nonmoving party may not rest on the mere allegations or denials of the pleadings, but must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle*, 75 Ohio App. 3d 732, 735 (1991).

{¶17} Although at common law a parent is not ordinarily liable for damages caused by his child's wrongful conduct, "liability can attach when the injury committed by the child is the

foreseeable consequence of a parent's negligent act." *Huston v. Konieczny*, 52 Ohio St. 3d 214, 217 (1990). The Ohio Supreme Court has outlined three ways that parents may incur liability: (1) negligent entrustment; (2) negligent supervision, and (3) consenting to or directing the child's wrongful conduct. *Id.* at 217-18. In this case, Allstate has alleged that Ms. Jaeger should be held liable for negligent supervision. "A parent may . . . be held responsible for failure to exercise reasonable control over the child when the parent knows, or should know, that injury to another is a probable consequence." *Id.*

{¶18} Ms. Jaeger has argued that there was no evidence that, prior to September 19, 2003, she possessed knowledge or notice of her son having engaged in similarly destructive behavior. In response, Allstate has argued that a genuine issue of material fact exists regarding Ms. Jaeger's prior knowledge of her son's "penchant for reckless and willful conduct" because Ms. Jaeger failed to point to evidence that she had never known her son to have engaged in reckless, willful, or destructive behavior. According to Allstate, Ms. Jaeger's affidavit contained only a specific denial that she knew her son intended to drive a car on September 19, 2003.

{¶19} In her affidavit, Ms. Jaeger said that, "[o]n and before September 19, 2003, there was no incident known to me where my son [M.J.] used a car and there was nothing from my observations that made me think he intended to use a car [on that date]." She further reported that she had spoken with her son on the night of the incident while he was at his cousin's house in Avon Lake. In her affidavit, Ms. Jaeger said that "there was nothing [she] learned [during that conversation] that made [her] think [he] was misbehaving or that he planned to use a car or do anything that would be dangerous to himself or to others."

{¶20} Ms. Jaeger met her initial burden under Rule 56(C) to point to evidence and identify the specific parts of the record that demonstrate there is no issue of material fact

regarding whether she knew or should have known that, without her intervention, her son would do something dangerous and damage someone's property. See *Vahila v. Hall*, 77 Ohio St. 3d 421, 428-29 (1997). She pointed to evidence tending to show that she did not know of any prior instance wherein her son had acted in a similar manner, endangering others or their property by using a car. She also pointed to evidence that she had supervised her son to the extent that she had spoken with him on the evening of the incident and she detected no cause for concern that he might "do anything that would be dangerous to himself or to others."

{¶21} In response, Allstate argued that Ms. Jaeger had failed to meet her initial burden under Rule 56. It argued that "[t]his Court must only be concerned that [Ms. Jaeger] did not affirmatively testify in her affidavit that she had never known [her son] to have engaged in reckless, willful, or destructive behavior." Contrary to Allstate's position, however, Ms. Jaeger carried her burden under Rule 56(C) of the Ohio Rules of Civil Procedure. In her affidavit, Ms. Jaeger said that, until the time her son stole the car and went joyriding in September 2003, she had never known him to "use[ ] a car" at all and had no reason to suspect he would steal one and cause property damage on September 19, 2003. If Allstate knew of contradictory evidence, or evidence that M.J. had a history of engaging in some other "reckless, willful, or destructive behavior," it did not share it with the trial court. Allstate did not support its motion with any evidence tending to show that Ms. Jaeger knew, or should have known, that injury to another was a probable consequence of her child's behavior. Thus, Allstate failed to carry its reciprocal burden to "set forth specific facts showing that there is a genuine issue for trial." Civ. R. 56(E).

{¶22} Viewing the pleadings, written admissions of fact, and affidavits in the light most favorable to Allstate, reasonable minds could only conclude that Ms. Jaeger did not know, nor should she have known, that injury to another was a probable consequence of her son's behavior.

Huston v. Konieczny, 52 Ohio St. 3d 214, 217-18 (1990). Therefore, there is no genuine issue of material fact regarding whether Ms. Jaeger was negligent in supervising her son. The trial court correctly granted summary judgment in Ms. Jaeger's favor. Allstate's second assignment of error is overruled.

CONCLUSION

{¶23} The trial court correctly granted Ms. Jaeger summary judgment on Allstate's statutory claims because there is no genuine issue of material fact regarding whether her son willfully damaged the garage or the fence or whether the property insured by Allstate was involved in her son's theft offense. The trial court correctly granted Ms. Jaeger summary judgment on Allstate's common-law negligent supervision claim because there is no genuine issue of material fact regarding whether Ms. Jaeger knew or should have known that damage was a probable consequence of her son's behavior. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

BRIAN GREEN, and KAREN BURKE, attorneys at law, for appellant.

MICHAEL F. FARRELL, attorney at law, for appellees.